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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1969

**No. 534**

CARVEL CORPORATION,

*Petitioner,*

—against—

ROBERT J. GRISWOLD, TRUSTEE, *et al.*,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

## BRIEF AND APPENDIX OF RESPONDENT IN OPPOSITION

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*Of Counsel*

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### Statement of the Case

Petitioner* applies for a writ of certiorari to review a decision of the First Circuit Court of Appeals insofar as it held that petitioner's claim is not provable in bankruptcy. Respondent opposes on the ground that the decision below is completely in accord with well-established law and that the petition presents no question of sufficient importance to justify review by this Court.

The facts relevant to the petition may be summarized as follows: Prior to the bankruptcy, petitioner and the

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* Petitioner is one of eight related creditors collectively referred to as "Carvel" in the proceedings below.

other Carvel claimants brought an action against the bankrupt and others in New York Supreme Court "for consummated conspiracy by defendants to commit the prima facie tort of bringing false and baseless law suits and proceedings ancillary thereto" (2b).[1] The bankrupt and his co-defendants defaulted, an inquest was held, and on April 11, 1966 the New York court rendered a memorandum decision directing entry of judgment in favor of each of the Carvel plaintiffs, including petitioner, in individual amounts totaling $11,580,488.34. However, a judgment implementing this decision was not entered with the Clerk of the New York court until July 25, 1966. In the meantime, on May 16, 1966, the bankrupt filed his petition in bankruptcy in the United States District Court for the District of Puerto Rico.

Petitioner filed a proof of claim (1b) in the bankruptcy which stated that it was based on the New York judgment entered July 25, 1966 (2b), a copy of which was annexed to petitioner's proof of claim.

Petitioner's claim was allowed by the Referee and by the District Court. The Court of Appeals reversed, holding that petitioner's claim was an intentional tort claim which, although liquidated in amount, was not merged in a final judgment prior to the filing of the petition in bankruptcy.

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[1] Numbers in parentheses followed by the suffix "b" refer to pages of the appendix printed herein.

## ARGUMENT

### Certiorari should be denied.

The First Circuit Court of Appeals unanimously decided that petitioner's claim is not provable in bankruptcy because it is an intentional tort claim which, although liquidated in amount, was not merged in a final judgment prior to the filing of the petition in bankruptcy. This holding is completely in accord with the long-standing policy of the Bankruptcy Act that intentional tort claims are not provable in bankruptcy except as judgment claims under Section 63a(1). *Lewis* v. *Roberts,* 267 U.S. 467 (1925); *Schall* v. *Camors,* 251 U.S. 239 (1919); and 3A Collier, *Bankruptcy* ¶63.25 [1] (14th ed. 1968). The fact that a tort claim is liquidated in amount prior to the filing of the petition in bankruptcy does nothing to aid its provability if it is not reduced to final judgment until after the filing of the petition. As Collier points out, it is not the element of liquidation that determines provability, but "the element of merger into judgment that gives the claim a standing independent of its tortious origin. . . ." 3A Collier, *Bankruptcy,* ¶63.25 [2] at 1892-93 (14th ed. 1968).

Petitioner does not contend that its claim was merged in a final judgment prior to the filing of the petition in bankruptcy; rather, petitioner argues that the statutory restrictions on the provability of intentional tort claims should be abrogated by this Court.

It is respectfully submitted that the Court of Appeals' decision is clearly in accord with established law and that petitioner's belief that the Bankruptcy Act ought to be amended because it imposes a personal hardship in his

case is not a proper basis on which to ask this Court to grant certiorari.

## CONCLUSION

The law governing the provability in bankruptcy of intentional tort claims is clear and uniform and completely in accord with the Court of Appeals' decision. No federal question of substance is presented, no conflict of decisions exists, and no questions are presented here of sufficient importance to justify or warrant exercise of this Court's power of supervision.

Certiorari should therefore be denied.

Respectfully submitted,

GEORGE D. REYCRAFT
*Attorney for Respondent*

CADWALADER, WICKERSHAM & TAFT,
C. DELOS PUTZ, JR.
*Of Counsel*

Dated: September 26, 1969.

# APPENDIX

## Proof of Claim of Carvel Corporation

1.

[This Proof of Claim is representative of the Proofs of Claim of the other seven Carvel Creditors. The portions printed below are identical in all the Carvel Proofs of Claim with the exception of the name of the claimant and the amount claimed. The names of the eight Carvel Creditors and the amounts claimed by each are set forth in the Final Judgment printed below, a copy of which is attached to each of the Carvel Proofs of Claim.]

* * *

2. That Louis G. Greenfield, the above named Bankrupt was at and before the filing by [or against] him of the petition for adjudication of Bankruptcy, and still is, justly and truly indebted [or liable] to claimant in the sum of $2,631,940.00.

3. That the consideration of this debt [or liability] is as follows:

Judgment obtained against bankrupt as a defendant in litigation in Supreme Court, New York State, Westchester County, entitled, Franchised Stores of New York, Inc. et al. against Greenfield et al., index no. 7877/1961; final judgment entered July 25, 1966, see copy of same.

* * *

GEORGE P. CLARKE
Signature of Individual, Partner or Officer
as *President*
of or for the Corporation

(Verified November 29, 1966.)

**Final Judgment Annexed to Each of the Carvel Proofs of Claim**

SUPREME COURT
OF THE STATE OF NEW YORK

COUNTY OF WESTCHESTER

Index No. 7877/1961

FRANCHISED STORES OF NEW YORK, INC., DARI-FREEZE STORES, INC., STORES OF PENNSYLVANIA, INC., DARI-FREEZE STORES OF NEW JERSEY, INC., CARVEL CORPORATION, CHAIN LOCATIONS OF AMERICA, INC., CARVEHICLE CORP., THOMAS CARVEL and AGNES CARVEL, d/b/a CARVEL STORE #8 on behalf of herself and all other CARVEL FRANCHISE DEALERS similarly situated,

*Plaintiffs,*

—against—

LOUIS G. GREENFIELD, SIDNEY W. ROTHSTEIN, ALFRED SHAW and CHARLES HASKELL,

*Defendants.*

The issues in the above-entitled action which is an action for consummated conspiracy by the defendants to commit the prima facie tort of bringing false and baseless lawsuits and proceedings ancillary thereto, having duly come on to be heard before Mr. Justice Hugh S. Coyle, without a jury at a Trial Term, Part 1, of this Court on the 28th day of February, 1966, and the issues having been duly tried on the day and the plaintiffs herein having duly appeared by Bleakley, Platt, Schmidt, Hart & Fritz, Esqs., their

*Final Judgment Annexed to Each of the Carvel Proofs of Claim*

attorneys and the defendants herein having defaulted in appearance, and the proofs having been adduced and counsel for plaintiffs having been heard, and the Court having after due deliberation on the 11th day of April, 1966, duly made and filed a decision in writing in favor of the plaintiffs and against the defendants and directing the entry of judgment as hereinafter provided,

Now, on motion of Bleakley, Platt, Schmidt, Hart & Fritz, Esqs., attorneys for the plaintiff, it is

ADJUDGED that the plaintiffs have judgment in the following amounts, and that the plaintiffs have execution therefor in the following individual amounts:

| | |
|---|---|
| FRANCHISED STORES OF NEW YORK, INC. due— | $1,579,164.58 |
| DARI-FREEZE STORES, INC. | 1,052,776.39 |
| STORES OF PENNSYLVANIA, INC. | 1,052,776.39 |
| DARI-FREEZE STORES OF NEW JERSEY, INC. | 526,338.20 |
| CARVEL CORPORATION | 2,631,940.00 |
| CARVEHICLE CORP. | 2,631,940.00 |
| THOMAS CARVEL | 1,052,776.39 |
| AGNES CARVEL | 1,052,776.39 |

Judgment signed and entered this 25th day of July, 1966.

/s/ EDWARD L. WARREN
*Clerk*